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Supreme Court of the United States

OCTOBER TERM, 1939.

No. 544.

JOHN J. CONDON, Mayor, GUSTAV W. KLEIN, JR., First Deputy and Acting Comptroller, and RAYMOND J. WHITNEY, City Manager, Acting as Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of The City of Yonkers,

Petitioners,

vs.

WALTER F. DOWNEY, Receiver of The First National Bank and Trust Company of Yonkers, in Liquidation.

PETITION OF JOHN J. CONDON, GUSTAV W. KLEIN, JR., AND RAYMOND J. WHITNEY FOR A REHEARING.

E. J. DIMOCK,
Counsel for Petitioners.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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PETITION FOR A REHEARING.

Comes now the above named petitioners, John J. Condon, Gustav W. Klein, Jr., and Raymond J. Whitney, and present this, their petition for a rehearing of the above entitled cause, and, in support thereof, respectfully show:

This cause was one of four (Nos. 542, 543, 544 and 545) argued February 29, 1940. On April 22, 1940, an opinion was handed down directing the affirmance of the judgment

below. (84 Law. Ed. Adv. Op. 681). In three of these causes (Nos. 542, 543 and 544) a point was involved which counsel believe was misapprehended by the court. Identical petitions for rehearing are therefore filed in those three cases.

In the petitioners' brief the point was made that payments aggregating $89,942.73 which were made by the bank upon the order of the City after the proclamation of the general bank holiday but prior to the appointment of the conservator, were not recoverable under Section 91 of Title 12 U.S.C.A., the statute involved.

That section provides:

> " all payments of money to either (shareholders or creditors), made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; * * *"

This point was disposed of by this court in six lines as follows:

> "The Circuit Court of Appeals affirmed this action. It held all withdrawals after March 9th occurred when the facts indicated The Bank would be unable to pay depositors in due course and that adequate evidence supported the trial court's finding of an intent to prefer. We find no reason to disregard these findings by two courts and accept them as correct."

We believe that this court was misled into treating the point as though a question of fact had been involved when in truth the question was purely one of law. We believe that the circumstance that the point was not orally argued

is responsible for the misunderstanding. Counsel for the City upon the argument became so interested in the inquiries of the Court upon the question which involved the whole judgment as to save no time to argue this question which involves a part of the judgment only.

It was settled in *McDonald* vs. *Chemical National Bank*, 174 U. S. 610, 1898, that payments may not be recovered on mere proof that they were made by officers of an insolvent bank with full knowledge of its insolvency.

The applicable part of the opinion in the *McDonald* case written by Mr. Justice Shiras, is as follows:

> "Nor can a finding that the payments and remittances made to the Chemical National Bank, on the dates above mentioned were made in contemplation of insolvency and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business, and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.
>
> In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National

Bank, but there was no evidence that, up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank and its transactions with the Chemical National Bank were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893."

The proof in this case, under the utmost inference, goes no farther than that in the *McDonald* case. The only evidence here was that the bank was closed with all other banks in the country by presidential proclamation and that it never reopened.

There is not, and cannot be, a suggestion that the City suspected the insolvency of the bank when the payments were made. There is not, and cannot be, a suggestion that the payments were for excessive amounts or for suspicious purposes. They were payments to meet payrolls and fire and police pension rolls. (No. 542. R. 166, 167, 181; No. 543. R. 121, 135; No. 544. R. 118.)

Counsel for the receiver in this court made no attempt to support the decision below as a finding of fact except in so far as it was a finding of insolvency. Insolvency was not in issue. The City's position was that, granting insolvency at the time of the payments, the law does not require the return of the payments.

Opposing counsel's only attempt to meet the *McDonald* case was to say that the payments made by the banks during the banking holiday were not made in the "usual course of business" as were those in the *McDonald* case. That flies in the face of the language of the Regulation of the Secretary of the Treasury* which defines the permitted transactions by providing that any bank may exercise its "usual banking functions". Moreover to say that all banking transactions in the country were out of the usual course of business and that therefore these were out of the usual course of business is a mere verbal trick. It ignores the reason behind the rule that payments made in the usual course of business by an insolvent bank are lawful.

If the opinion in this Court is to stand, this Court will have overruled *McDonald* vs. *Chemical National Bank, supra,* and will for the first time have permitted a receiver to recover payments made by a national bank upon mere proof of its insolvency when they were made.

The only other point made by counsel for the receiver, i. e., that the payments did not come within the terms of the governmental order and thus were recoverable *"independently* of the *illegal preference section"*,† was not noticed in the opinion of this Court or either of the other courts which have considered the case. We feel however that on a motion

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* Respondents' brief p. 47.

† Respondents' brief p. 46.

of this kind we should give it a few words. The claim is that the limitation of the exercise of usual banking functions "to such extent as its situation shall permit" changed, for that particular period, the rule that payments made in the usual course of business by an insolvent bank are lawful. Our position is that if the Secretary of the Treasury had wished to put that clog upon payments "absolutely necessary * * for food, medicine * * usual salaries and wages * * and for other similar essential purposes" he would not have left it to such shadowy inference. His obvious purpose in the limitation was to avoid the imputation that he was legalizing payments which otherwise would have been unlawful.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted and that the judgment of the Circuit Court of Appeals for the Second Circuit be, on further consideration, reversed.

Respectfully submitted,

E. J. DIMOCK,
Counsel for Petitioners.

LEONARD G. MCANENY,
J. DONALD RAWLINGS,
Of Counsel.

Certificate of Counsel

I, E. J. DIMOCK, Counsel for the above named petitioner DO HEREBY CERTIFY that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

E. J. DIMOCK,
Counsel for Petitioners.